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No. 908

IN THE

Supreme Court of the United States

WASHINGTON, D. C.

OCTOBER TERM, 1963

WILLIAM LEIGHTON, a stockholder of Paramount Pictures Corporation on behalf of himself and/or others similarly situated and for and on behalf of Paramount Pictures Corporation,

Petitioner-Plaintiff,

v.

HON. THOMAS F. MURPHY, United States District Judge Southern District of New York,

Respondent,

and

HON. THOMAS F. CROAKE, United States District Judge Southern District of New York,

Respondent,

and

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL and PAUL E. MANHEIM,

Respondents-Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

and

ON MOTION FOR LEAVE TO FILE PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-DEFENDANTS PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL AND PAUL E. MANHEIM

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The Opinion Below

The opinion of the United States District Court for the Southern District of New York is not reported but is annexed to the petitioner's papers; no opinions were rendered by the Court of Appeals for the Second Circuit.

Jurisdiction

The order of the Court of Appeals for the Second Circuit denying petitioner's application for leave to file petitions for writs of mandamus and prohibition was entered on December 13, 1963. The petition for a writ of certiorari and the motion for leave to file petitions for writs of mandamus and prohibition were filed on March 11, 1963. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1) and 28 U.S.C. §1651(a).

The Question Presented

Although petitioner asserts several purported questions, we believe the sole question presented is as follows:

> Did the Court of Appeals for the Second Circuit properly deny petitioner's application for leave to file petitions for writs of mandamus and prohibition by its order of December 13, 1963?

Statement of the Case

The action below purports to be a stockholders' derivative suit, instituted by petitioner as a *pro se* litigant. The summons and complaint were served on the respondents-defendants between October 9 and October 14, 1963. The complaint pleads a variety of wrongdoing on the part of the individual respondents-defendants in a series of rambling allegations. Respondents-Defendants, familiar with petitioner's prior history as an unsuccessful but dogged *pro se* litigant, moved, by order to show cause, for an order requiring petitioner to post security for costs before proceeding further in the action. The order to show cause, signed by Judge Thomas F. Murphy, included provisions

staying the prosecution of the action by petitioner pending determination of the motion for security, and extending the time of respondents-defendants to answer the complaint until 10 days after either the determination of the motion for security or posting if ordered by the Court. The motion for security was argued on November 4, 1963 and on November 18, 1963 Judge Thomas F. Croake granted respondents-defendants motion to the extent of requiring petitioner to post security in the amount of $2,000 under Rule 2 of the local Civil Rules of the District Court. After a delay occasioned by various applications made by petitioner, on December 23, 1963 Judge Croake entered an order directing that the action be dismissed unless petitioner post security in the amount of $2,000 within a specified time, and staying proceedings in the action on the part of petitioner, in the following language:

> "ORDERED, that until the filing of the security aforesaid, all proceedings on the part of plaintiff are stayed, without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay. * * *"

This language was proposed by petitioner and adopted by the Court.

Security was not posted and on January 23, 1964, Judge Croake enfered an order dismissing the action in the following languaga::

> "ORDERED, ADJUDGED AND DECREED that the within action be and the same hereby is dismissed, without prejudice, however, to the rights, if any, of any member of the class (except the named plaintiff, William Leighton) on behalf of whom plaintiff purportedly brought this action."

During the course of the proceedings in this action, petitioner has brought on the following motions and applications:

(a) A motion for a preliminary injunction, the disqualification of counsel for respondents-defendants and the appointment of a receiver for Paramount. That motion was marked off the motion calendar by Judge Croake pending the determination of the motion for security.

(b) An application in the Court of Appeals for leave to file petitions for writs of mandamus and prohibition against Judges Murphy and Croake, complaining of Judge Murphy's order staying proceedings and extending respondents-defendants' time to answer, and Judge Croake's opinion granting the motion for security to the extent of requiring petitioner to post security in the amount of $2,000. The Court of Appeals denied the application without opinion. This motion is the subject of the Petition for Writ of Certiorari here.

(c) A motion in the District Court for an order vacating the stay provision of Judge Croake's order of December 23, 1963 requiring security, the entry of default judgments and for an order restoring the preliminary injunction motion to the motion calendar. The motion was denied without opinion.

(d) An application to resettle the order of December 23, 1963 for the purpose of permitting the prosecution an interlocutory appeal to the Court of Appeals. The application was denied without opinion.

(e) An application for leave to appeal to the Court of Appeals from the order of December 23,

1963. The application was denied by the Court of Appeals without opinion.

(f) A motion to the Court of Appeals for leave to file a petition for rehearing on plaintiff's previous application for leave to file a petition for writs of mandamus and prohibition. The motion was denied without opinion.

(g) An application to the Court of Appeals for a stay of the operation of the order of December 23, 1963 in the United States District Court. The application was denied without opinion.

(h) Just before the action was dismissed, petitioner moved in the District Court for an order (1) vacating the order of December 23, 1963, (2) striking all pleadings, memoranda of law and other papers filed by the respondents-defendants in the action and (3) referring to the Chief Judge of the District Court the alleged misconduct of junior counsel associated with the attorney for the individual respondents-defendants. This caused respondents-defendants to move to punish petitioner for contempt of court for violating the stay provision in the order of December 23, 1963. The motion was granted and an order was entered on March 12, 1964 directing petitioner to pay a fine of $800. The applications to this Court followed. One of those applications, to stay the operation of the order holding petitioner in contempt, was denied by Mr. Justice Harlan on March 16, 1964, and another, addressed to the Chief Justice, was denied on March 25, 1964.

Petitioner has filed notices of appeal from the following orders:

(i) The order of December 23, 1963 requiring security;

(ii) The order of January 22, 1963 denying petitioner's motion to vacate the stay provision of Judge Croake's order and seeking default judgments referred to in paragraph (e) above;

(iii) The order and judgment of January 23, 1964 dismissing this action against petitioner; and

(iv) The orders and judgment of March 12, 1964 holding petitioner in contempt of court and denying his motion referred to in paragraph (h) above.

Petitioner has repeated many of the personal attacks on counsel in his application here which have characterized his papers below, and which have increased in vehemence as the litigation has progressed. The full record deals with all his charges in detail and we will not burden the Court with a repetition here. The charges are totally irresponsible and unworthy of detailed consideration.

ARGUMENT

I

There is No Colorable Question of Law Presented on this Petition

Petitioner seeks review of the Court of Appeals' denial of his application for leave to file a petition for writs of mandamus and prohibition directed to District Judges Murphy and Croake. That application was directed at the judicial act of Judge Murphy in granting a stay of proceedings pending the hearing and determination of a motion for security and granting an extension of time for the defendants to move against or answer the complaint

pending the hearing on the motion. The application also was directed to Judge Croake's decision that petitioner should post security in the amount of $2,000 before proceeding with the action, pursuant to the provisions of Rule 2 of the Civil Rules of the United States District Court for the Southern and Eastern Districts of New York.

Petitioner's apparent object is to make a collateral attack on these judicial acts in the hope that by undoing them the respondents-defendants would be in default in filing their answers in the actions below. Thus, argues petitioner, default judgments could be entered against respondents and petitioner would receive $1,000,000 in "punitive damages" which he demands in his complaint.

It is an elementary principle that the Federal Courts have power to issue stays in the course of administering proceedings before them. *Landis* v. *North American Co.*, 299 U. S. 248 (1936). Judge Murphy's order extending the defendants' time to move or answer was entirely proper under Rule 6(b) of the Federal Rules of Civil Procedure, which authorizes an *ex parte* extension of time upon timely application. With respect to Judge Croake's opinion that petitioner should post security, it is clear that Judge Croake had the power to order such security under local Civil Rule 2. Petitioner's remedy to review the exercise of that power lies in an appeal from the final order dismissing the complaint. A notice of appeal, in fact, has been filed from that order.

II

The Decision Below is Clearly Correct

On petitioner's application for leave to file petitions for writs of mandamus and prohibition, the Court of Appeals had only to decide two questions:

> (1) Did Judge Murphy have the power to grant defendants an extension of time to answer the complaint and to stay the proceedings pending the motion for security?

It is plain that power resided in the Court below. See *Landis* v. *North American Co., supra.* It is also obvious from the record that Judge Murphy's order was a proper exercise of discretion.

> (2) Did Judge Croake have the power to require petitioner to post security for costs before proceeding with the action?

Local Rule 2 provides:

> "The court, on motion or on its own initiative may order any party to file an original bond for costs or additional security for costs in such an an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: An order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party."

It is clear that the District Court did have such power and properly exercised it. See *Miller* v. *Town of Suffield,*

249 F. 2d 16 (2d Cir., 1957), *cert. denied* 356 U. S. 978 (1958); *Leslie One-Stop in Pennsylvania, Inc.* v. *Audio Fidelity, Inc.*, 33 F.R.D. 16 (S.D.N.Y., 1963); *Rockaway Pix Theatres, Inc.* v. *Continental Distributing, Inc.*, 7 F.R. Serv. 2d 83.611 Case 2 (E.D.N.Y., 1963).

III

The Motions for Leave to File Petitions for Writs of Mandamus and Prohibition Should be Denied

It is difficult to understand how little or how much of the proceedings below petitioner would ask to have reviewed by this Court if he were allowed to petition for writs of mandamus and prohibition. In his brief in support of his applications here he condemns almost every judicial act of the District Court and the Court of Appeals. He especially seems to attack Judge Croake's order of December 23, 1963 directing him to post security and the order dismissing this action entered on January 23, 1964. The proper time for making those attacks, of course, is when his appeal from the final order dismissing the complaint comes on for hearing. Plainly this case does not meet the rigid requirements for the issuance of extraordinary writs at this stage of the proceedings. See *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953) and *Ex Parte Fahey*, 332 U. S. 258 (1947); cf. *Roberts* v. *United States District Court*, 339 U. S. 844 (1950). This is far from an extreme case and the petitioner has more than adequate remedies available elsewhere by pursuing the regular course provided for all other litigants.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file petitions for writs of mandamus and prohibition should be denied in all respects.

Respectfully submitted,

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April 9, 1964